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16 MATSURA

17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF CALIFORNIA

19 UNITED STATES,

20 Plaintiff,

21 vs.

22 JOSE SUSUMO AZANO
23 MATSURA,

24 Defendant.

CASE NO. 14-cr-0388-MAA

**SUPPLEMENTAL PLEADING IN
SUPPORT OF MOTION TO
SUPPRESS WIRETAP
EVIDENCE; JOINDER IN
SUPPLEMENTAL PLEADING OF
RAVI SINGH**

**Time: TBA
Date: TBA**

25 **I.**

26 **INTRODUCTION**

27 Docket Entry 171, filed on July 21, 2015, this Court ordered counsel
28 for Mr. Azano to submit supplemental briefing on or before August 5,
2015, on the following issue:

Whether Azano's motion to suppress is moot based
on the government's representation that it will not

introduce as evidence at trial the single intercepted call to which Azano was a party during the first 30-day period of interception after the initial wiretap application, nor any derivative evidence.

Whether the government intends to introduce that one call or not, the government used the wiretap as a lynchpin in its investigation and, in particular, in obtaining Court permission for a search warrant of Mr. Azano's home. Under 18 U.S. Code § 2515, the "fruits of the poisonous tree" doctrine from *Wong Sun v. United States*, 371 U.S. 471 (1963) applies to evidence derived from illegal wiretaps. *See, United States v. Smith*, 155 F.3d 1051, 1059-60 (9th Cir. 1998).

In addition, the government has not stated that it will not use calls in which Mr. Azano was not a party as evidence at trial under Federal Rules of Evidence, Rule 801(d)(2)(E) or some other hearsay exception. Thus, the wiretap motions are moot for Mr. Azano only if the government agrees not to use *any* intercepted calls at trial *and* agrees to redact the references to the wiretap evidence from the probable cause in the subsequent search warrants when we move to suppress.

II.

FACTS

The government used intercepted conversations and data from the illegal wiretaps to further their investigation and procure evidence for trial. For instance, the government used the results of the illegal wiretaps in, among other pleadings with the Court, including the following:

<u>Pleading</u>	<u>Date</u>	<u>Case Number</u>	<u>Discovery Reference</u>
Application for Pen Register, etc.	9/18/13	13 mc 1168	EM_PLDGS_00000146

Application for Pen Register, etc.	7/23/13	13 mc 0923	EM_PLDGS_00000115
Application for Search Warrant for 1015 O Street, NW, Washington, DC	1/29/14	14 mj 0045 (US DC for DC)	EM_PLDGS_2422- 2481

The government also used the (illegal) wiretaps in order to obtain a warrant to search Mr. Azano's home. EM_PLDGS_00002178. The affidavit in support of that search directly references the illegally obtained wiretaps in paragraphs 96-99. In paragraph 96 the affidavit notes that the Honorable Anthony J. Battaglia authorized interceptions and the renewed the authorization. However, the affidavit omitted the information detailed in Mr. Azano's motion to suppress the wiretap evidence, including that the investigation of this case took years. During that time the government investigated virtually every possibility of crime. Having come up empty handed, the government sought a wiretap for a nonexistent "bribery" scheme (which may allow a Title III wiretap) and thirty days later pretended the wiretap caused them to stumble on a campaign finance fraud case (Title III forbids wiretaps for campaign finance fraud).

The government also concealed in the wiretap affidavit (which concealment was omitted from the search warrant affidavit) that they had been investigating the campaign finance fraud for a year and a half. In addition, when the government applied for their wiretap they failed to present proof of probable cause or necessity required for a wiretap. As discussed in the wiretap motions, the material misstatements and omissions in the wiretap application warrant a *Franks v. Delaware*, 438 U.S. 154 (1978) hearing or dismissal.

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2 The search warrant affidavit claims that the “wiretap interceptions
3 provide further corroboration of these . . .” illegal campaign activities. The
4 affidavit then details illegally intercepted calls to establish probable cause
5 to search Mr. Azano’s home at paragraph 96 (detailed description of call),
6 paragraph 97 (continued detailed description of call), and paragraph 98
7 (continued description of same call and additional call).

8 **III.**

9 **MR. AZANO’S MOTION IS NOT MOOT**

10 In *United States v. Cales*, 493 F. 2d 1215 (9th Cir. 1974) the Ninth
11 Circuit considered a case where an illegal wiretap led to an investigation
12 and prosecution of the appellant. The district court in *Cales* suppressed all
13 evidence obtained in the investigation because of the illegal wiretap and
14 the government appealed.

15 On appeal, the Ninth Circuit in *Cales* held that the government must
16 prove by a preponderance of the evidence that “the evidence which it
17 intends to use at trial was obtained from sources sufficiently independent
18 of the wiretap.” *Id.* at 1216 (citations omitted). The Ninth Circuit also
19 directed the district court as follows: “The district court must seek to
20 discover what kind of direction and impetus the illegal wiretap gave to the
21 . . . investigation: did anything seized illegally, or any leads gained from
22 that illegal activity, tend significantly to direct the investigation toward the
23 specific evidence sought to be suppressed?” *Id.* at 1215-126.

24 The Honorable William Q. Hayes affirmed the *Cales* and *Smith*
25 standards in *United States v. Chavez-Chavez*, 2008 U.S. Dist. LEXIS 33510
(S.D. Cal. 2008):

26 Under Ninth Circuit precedent, the inquiry in
27 evaluating taint is [footnote omitted] whether

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2 anything seized illegally or any leads gained from
3 illegal activity, tend significantly to direct the
4 investigation toward the specific evidence sought
5 to be suppressed. [Footnote omitted] *United States*
6 *v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974). The
7 nexus between the original illegality and the
8 specific evidence subject to challenge must be a
9 close one. *Smith*, 155 F.3d at 1061.

10 In this case the nexus between the illegally obtained wiretap
11 evidence and evidence “subject to challenge” (the evidence seized from
12 Mr. Azano’s home) could not be closer or more direct: the government
13 quoted from illegally intercepted calls to obtain the warrant to search Mr.
14 Azano’s home. The motion to suppress the evidence obtained with that
15 warrant will be heard at the next motion hearing, but this Court must first
16 rule whether the wiretap (relied upon to obtain the search warrant) was
17 illegal before considering other challenges to the search warrant. Thus,
18 Mr. Azano’s motion to suppress is not moot under Ninth Circuit and
19 Supreme Court precedent.

20 Finally, as the parties have before this Court a motion to dismiss
21 under its supervisory powers because of the illegality of the search
22 warrants (and the government subterfuge) the wiretap issues are not
23 moot.

24 IV.

25 CONCLUSION

26 For the foregoing reasons, this Court should grant the above
27 motions.

28 Dated: March 21, 2014

Respectfully submitted,

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/s/ Knut S. Johnson
Knut S. Johnson, Esq. for
Jose Susumo Azano Matsura